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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR GARCIA, Defendant and Appellant.	F075064 (Super. Ct. No. F13909372) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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BACKGROUND

In an amended information filed September 22, 2016, defendant was charged with nine counts of committing a lewd act upon a child under the age of 14 (Pen. Code,[1] § 288, subd. (a) [counts 1–6 & 11–13]);[2] three counts of committing a lewd act upon a child at least 10 years younger than defendant (§ 288, subd. (c)(1) [counts 7–9]); and one count of dissuading a witness by threat or force (§ 136.1, subd. (c)(1) [count 10]).

The amended information also alleged a multiple victim enhancement (§ 667.61, subd. (e)(4)) as to counts 1 through 6 and 11 through 13, and that the victim of counts 5 and 6 (Jocelyn) was under the age of 14 at the time of the offense (§ 667.61, subd. (j)(1)).

A jury convicted defendant on all counts and found the enhancement allegations true.

The court sentenced defendant to a total determinate term of five years in prison and a total indeterminate term of 155 years to life. The indeterminate sentence was comprised of: 25 years to life on count 5; seven consecutive terms of 15 years to life on counts 1 through 4 and 11 through 13; and one consecutive term of 25 years to life on count 6. The determinate sentence was comprised of: three years on count 10; and three consecutive terms of eight months on counts 7 through 9.

Defendant appeals. We reject the majority of his contentions, modify the sentence on counts 5 and 6, and otherwise affirm.

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1 All subsequent statutory references are to the Penal Code unless otherwise noted.

2 Counts 1 through 6 pertain to victim Jocelyn and counts 11 through 13 pertain to victim Jessica.

FACTS

I. Evidence Concerning Victim Jocelyn

Defendant married Patricia P.[3] in 2001. Patricia had two children from a prior relationship, her daughter Jocelyn and her son U.J. At the time Patricia and defendant married, Jocelyn was three or four years old. Patricia and defendant also have four children together.

Events of September-October 2013

One night in September 2013, Patricia was lying in bed having trouble sleeping. Some time later, defendant, who had also been in bed, got up. He walked out of the room and was gone for about three minutes before returning to stand in the hallway. When he returned, Patricia thought he "looked strange." Defendant stood there for about 10 seconds and went somewhere else. Patricia waited a minute before going to the kids' rooms. When she got to Jocelyn's room, the door was shut. Patricia opened the door and saw Jocelyn lying down sleeping, but her skirt had been pulled up and her underwear pulled down. Defendant was on his knees, touching Jocelyn's buttocks. Defendant told Patricia if she reported him, he would kill her. Patricia considered calling police, but feared defendant would hurt her or the children.

Weeks later, on October 1, 2013, Patricia asked Jocelyn if she had been touched inappropriately. Jocelyn told mother, "no," but was lying because she was concerned for their family's financial situation. Later that same day, Patricia went to the Reedley Police Department and reported what she had seen weeks prior. Officers told Patricia to get Jocelyn and bring her in as well, so she did. Just before going to the station, Jocelyn told Patricia defendant had been touching her and it had been going on for eight years.

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3 In order to prevent identification of the minor victims involved in this case, we are not providing last names of victims, family members and witnesses. We are not providing the first name of Patricia's son because it is uncommon and could potentially be used to identify victims.

Patricia does not know exactly what Jocelyn told law enforcement. Jocelyn was 16 years old when they went to the police station.

On October 3, 2013, Jocelyn was interviewed by a forensic interviewer named Caroline Dower.[4]

Events at the Kerman Home

Jocelyn testified she was eight years old when she first remembers defendant touching her. They lived in Kerman at the time. Defendant started touching her "butt" and told her it was a game. She did not know it was wrong. Jocelyn did not remember how many times it occurred while they lived in Kerman.

Events at the J Street Home

The next time Jocelyn remembers defendant touching her occurred when the family lived on J Street in Reedley.[5] When she was 10 or 11 years old, defendant would grab her in the pool and start touching her. At various times, he would touch her "butt," "vagina," and/or "chest area," or would pull down her underwear. Defendant would also touch her "butt" with his penis. This occurred "several" times, though Jocelyn did not recall exactly how many times.

Events at the Dinuba Street Home

When Jocelyn was 11 years old, the family moved to a home on Dinuba Street in Reedley. There, defendant touched her "butt" and her "chest." Around the time Jocelyn turned 12 years old, she wanted it to stop and would not let defendant touch her. As a result, Jocelyn testified, "it started happening when I was asleep." "I would wake up sometimes to him being there and I would pretend that I was asleep, but I wasn't." This

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4 That interview is described in greater detail in connection with Issue II of the Discussion, below.

5 The family lived in two different houses on J Street in Reedley. Jocelyn does not remember defendant touching her in the first house they lived in on J Street, only the second. When this opinion refers generically to the house on J Street in Reedley, it is a reference to the second house.

occurred "more than once a week." Jocelyn would wake up and defendant "would be touching my chest or my vagina, my butt …." Defendant would touch the "inside" of Jocelyn's vagina.

Events at the D Street Home

When Jocelyn was 12 or 13 years old, the family moved to D Street. There, defendant continued the same conduct that had been occurring at the Dinuba Street home, "[n]othing changed."

Events at the Enns Street Home

When Jocelyn was 14 years old, they moved to Enns Street in Reedley. There, "[t]he same thing happened. He would go into my room at night, touch the same places, my bottom, my vagina, my chest." This would occur two or three times per week. Defendant would touch "inside" her vagina, and "inside" the "cheeks" of her "butt."

Events at the Friesen Street Home

Defendant's conduct continued when the family moved to a home on Friesen Street in Reedley, when Jocelyn was 15 years old. Defendant would touch her butt, vagina, and chest. Jocelyn would pretend to wake up so defendant would leave. She would then stay awake the rest of the night. Defendant tried to touch her several times per week.

II. Evidence Concerning Victim Jessica

Jessica was born in October 1992, and was 24 years old when she testified. Defendant was a friend of Jessica's family.

One day, when Jessica was around 12 years old, she and some other kids were running around at church. Defendant approached Jessica from behind and began to rub her breasts for "maybe like … three minutes." Jessica was shocked and scared and did not tell anyone.

In a separate incident, Jessica and her siblings stayed the night with defendant's family at defendant's trailer. Defendant's children were asleep in their room, and

Jessica's siblings fell asleep on a couch in the living room. Jessica was also on the couch but had not yet fallen asleep when defendant "got close" to her on the couch. Defendant pulled up her skirt and began rubbing her thigh. Jessica told him to stop, but defendant kept doing it for "maybe like one more minute." Defendant also rubbed her breasts and under her shirt and bra.

On yet another day, defendant invited Jessica's family over for a barbecue. Jessica went to the bathroom and when she exited defendant was waiting for her. Defendant would not let her leave and began to "hug[]" her, and touch her "butt." Jessica told him to stop. Defendant told her not to tell her parents or else he would kill them.

These first three incidents occurred within "like weeks" of one another, all when Jessica was around 12 years old.

On Jessica's birthday, when she was turning 13 years old, her parents invited defendant's family over. Jessica was playing basketball when defendant approached her from behind and touched her breasts. That night, Jessica told her parents what had happened.

Several years later, when Jessica was around 18 years old, a police officer came to speak to her about defendant.

III. Defendant's Arrest

Law enforcement officers went to defendant's place of work on October 1, 2013. When defendant saw one of the officers, he looked scared and "fled" quickly out of a nearby door. Hours later, officers arrested defendant at a residence.

DISCUSSION

I. The Sentence on Counts 5 and 6 Must be Modified Pursuant to the Ex Post Facto Clauses of the California and United States Constitutions

A. Background

In count 5, defendant was charged with committing a lewd act upon a child in

violation of section 288, subdivision (a). The amended information alleged defendant committed the lewd act between May 13, 2009, and May 12, 2011. The amended information further identified the lewd act as the time defendant "touched [Jocelyn] at the Dinuba [Street] house the first time."

In count 6, defendant was charged with committing another lewd act upon a child in violation of section 288, subdivision (a). Again, the amended information alleged defendant committed this lewd act between May 13, 2009, and May 12, 2011. The amended information further identified this lewd act as the time defendant "touched [Jocelyn] at the Dinuba [Street] house the last time."

In sum, count 5 was based on the first time defendant touched Jocelyn at the Dinuba Street house and count 6 was based on the last time defendant touched Jocelyn at the Dinuba Street house.

In September 2010, section 667.61 was amended by Statutes 2010, chapter 219, section 16, page 1027, to add subdivision (j)(2):

> "(2) Any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e), upon a victim who is a child under 14 years of age, shall be punished by imprisonment in the state prison for 25 years to life."

Here, defendant was sentenced to terms of 25 years to life on each of count 5 and count 6.

B. Prohibition on Ex Post Facto Laws

"Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10; Cal Const., art. I, § 9; [citations].)" (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1163.) One example of an ex post facto law is " 'any statute … which makes more burdensome the punishment for a crime, after its commission ….' " (*Id.* at p. 1164.)

C. Analysis

Defendant argues the evidence does not show the lewd acts described in counts 5 and 6 occurred prior to September 2010, and therefore the imposition of the harsher sentence permitted by the statutory amendment violated the ex post facto clauses of the United States and California Constitutions. The Attorney General concedes the issue as to count 5 and agrees the sentence on that count must be reduced to 15 years to life.

As to count 6, the Attorney General argues "substantial evidence" from the trial showed the act underlying count 6 "must have" occurred "close to May 2011." However, that is not the method of appellate review in these circumstances. When the charging document alleges a crime occurred within a range of dates, and the statutory penalty for that crime was increased during the date range, it is "inappropriate" for an appellate court "to review the record and … infer that certain acts probably occurred after" the penalty increase was enacted. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 261 (*Hiscox)*.)

Even if such an inquiry into the record were appropriate, the evidence is far from clear on the matter. Jocelyn was born in May 1997. She testified she moved to the house on Dinuba Street when she was 11 years old—which would mean between May 2008 and May 2009. Jocelyn testified she moved out of the house on Dinuba Street when she was "12 or 13." Jocelyn was 12 years old from May 2009 to May 2010. If she moved out during that timeframe, the last time defendant would have touched her in the Dinuba Street house (i.e., the act underlying count 6) would have occurred before the statutory amendment effective September 2010. Thus, if Jocelyn moved out of the Dinuba Street house when she was 12—a possibility expressly contemplated by her testimony—defendant's sentence on count 6 would violate the ex post facto clauses.

Of course, since Jocelyn testified she moved out when she was 12 *or* 13, she could have moved out as late as May 2011—just before she turned 14 years old. In that circumstance, the last touching could well have occurred *after* the statutory amendment (i.e., between mid-September 2010, and May 2011), and the sentence on count 6 would

not violate the ex post facto clause. However, we decline "to hypothesize … what dates might be attached to certain acts based on ambiguous evidence …." (*Hiscox*, *supra*, 136 Cal.App.4th at p. 261.)

The sentences on *both* counts 5 and 6 must each be reduced to 15 years to life.[6]

II. Counts 1 and 2 are Supported by Substantial Evidence

A. Issue

In count 1, defendant was charged with committing a lewd act upon a child, "[t]o wit: touched her at the Kerman house the first time." In count 2, defendant was charged with committing another lewd act upon a child, "[t]o wit: touched her at the Kerman house the second time."

Defendant argues there was only evidence of one touching at the Kerman house, not two. As a result, he argues, one of the convictions should be reversed for insufficient evidence.

The Attorney General acknowledges, in her trial testimony, Jocelyn did not describe more than one incident in Kerman.[7] However, the Attorney General contends in her interview with Caroline Dower—which was shown to the jury—Jocelyn *does* describe more than one occasion of lewd touching at the Kerman house.

B. Standard of Review

" 'To assess the evidence's sufficiency, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime … beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

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6 Defendant also argues if we reject his ex post facto claim, the sentences violate *Alleyne v. United States* (2013) 570 U.S. 99. We have not rejected his ex post facto claim.

7 At trial, Jocelyn was asked if more than one touching occurred at the Kerman house, and she replied, "I don't remember."

[Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict.' " (*People v. Penunuri* (2018) 5 Cal.5th 126, 142, italics omitted.)

C. Background

Because the dispute centers around Jocelyn's forensic interview, we will describe portions of it below.

Patricia and Jocelyn spoke with police on October 1, 2013. Defendant was arrested the same day. On October 3, 2013, Jocelyn was interviewed by a forensic interviewer named Caroline Dower.

During the interview, Jocelyn said the touching began when she was "probably eight." The first time occurred in her parent's bedroom at their home in Kerman. During the first time, defendant took off her underwear. Jocelyn said she "honestly" does not "remember much about" the first time. The interviewer asked what she *did* remember, and Jocelyn responded:

> "What I remember—well—well that—that would happen constantly and it was—actually, it happened a lot and, uh, sometimes it would be when I was small—when I was asleep too. And, um, well basically that was pretty much it just touching."

When asking Jocelyn about touching that occurred in the Kerman home, Jocelyn said defendant would say they were "just playing a game." She then said, "I think some—one time or *sometimes* he did. He would say that." (Italics added.)

The following exchange occurred shortly thereafter:

> "[Interviewer:]Okay. And when this would happen I know you told me about the first time about what happened with your lower clothing you weren't sure about your upper clothes. How about *other times*, how would you[r] clothes be? [¶] ... [¶]
>
> "[Jocelyn:]He *just* put his hands *through* my clothes." (Italics added.)

D. Analysis

We agree with the Attorney General that Jocelyn's statements during the forensic interview constitute substantial evidence of at least two separate touching incidents at the Kerman home. Though there is equivocation or ambiguity about certain details, Jocelyn clearly identifies one time when defendant touched her after removing her underwear (i.e., the "first time") and at least one "other time[]"[8] when he "just put his hands through" her clothes. Because the inference defendant touched Jocelyn at least two times while they lived in Kerman is reasonable and supports the judgment, we reject defendant's substantial evidence challenge.

III. The Court Did Not Commit Prejudicial Error in Expounding on Reasonable Doubt During Voir Dire

A. Background

During jury selection voir dire, the prosecutor told prospective jurors there was a difference between proving something beyond a reasonable doubt versus proving something beyond *all* doubt. Later, near the end of voir dire, a prospective juror told the prosecutor he was "not sure where you're going with" the concept of proving something beyond all doubt. The prosecutor responded as follows:

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8 This phrase came from the interviewer's question.

"So anything in life is possible, right? So the standard beyond a reasonable doubt all doubt [*sic*], the only way you're going to get there is if you, yourself, witness something. So obviously the 12 jurors in this case aren't going to be witnesses to what happened in the case. So beyond all doubt is saying there's no possible way it could be anything else. Beyond a reasonable doubt is you have an abiding conviction that this is what happened, that this charge is true. You have enough to convince you that this happened. Now there could be other scenarios that technically might be a possibility, but don't necessarily—I'm not explaining this very well."

At that point, defense counsel requested the court define reasonable doubt for the jury. The court then said:

"The instruction is that there has to be proof beyond a reasonable doubt. That doesn't mean beyond a shadow of a doubt or beyond all doubt. Reasonable doubt is defined as that situation where, based upon all the evidence that was presented and your view of all the that [*sic*] evidence, it leaves you with a mind that there's an abiding conviction that the charge is true. If whatever it takes to have an abiding conviction for you, that's beyond a reasonable doubt.

"Hypothetical or example I might give is you can look at reasonable doubt maybe like a crossword puzzle, that in a case you'll get different witnesses presenting different pieces of the puzzle. And at the end of the case you're going to be asked to decide what is that picture that the puzzle comprises. Now if there are so many pieces missing that you can't say what the picture is, then you would have a reasonable doubt. If there was, for example, only one piece missing but that piece was so large you couldn't tell what the picture was, that would be a reasonable doubt. But just because there's a piece missing here and a piece missing there, if you can look at the evidence that way and say from all that I'm convinced, I have an abiding conviction that this is the picture of, for example, what was on the cover of the box, this is what it purports to be, then you would have an abiding conviction. If you were so convinced, and the examples I've given, you know, one juror might be of the opinion that this one piece over here is so big that I'm not convinced that this is really what the picture is, it could be something similar to it or like it, but I have a reason to believe that it's not that picture on the box because of what is missing.

"Does that concept generally tell you a little bit? I mean, it's not probably the best example, but it's as good example as I can give you on what might be reasonable doubt to an individual person in looking at evidence generally. But the definition you get is proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. And as mentioned, if you believe

> any one witness as to what they testified to, that any one witness can prove any fact in a case and that includes any element of an offense if you believe that person. If you have an abiding conviction as to what they've said is accurate, then you can believe that to prove that fact."

Neither the prosecutor nor defense counsel objected to the court's statement, nor did anyone request clarification or additional explanation.

After the jurors were selected and sworn, the court gave the jury preliminary instructions, including the reasonable doubt instruction: CALCRIM No. 220. After the evidence had been presented at trial, the court again instructed the jury with CALCRIM No. 220, as follows:

> "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime or brought to trial. A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt.
>
> "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.
>
> "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge true [*sic*]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

B. Analysis

1. Issue

Defendant argues the court's puzzle analogy constituted structural error requiring reversal of the entire judgment. Though the Attorney General does not concede error, the primary thrust of its argument is the court's comments during voir dire were harmless in light of the repeated, correct instructions on reasonable doubt.

2. Law and Application

"[I]t is difficult, if not impossible, to give a precise and intelligible definition of what a reasonable doubt is, without extending an instruction into almost a treatise upon the subject …." (*People v. Johnson* (2004) 119 Cal.App.4th 976, 986.) As a result, courts should stick to the pattern jury instructions on the topic. (See *ibid*.) However, while " ' "attempts at definition are likely to prove confusing and dangerous" ' " (*ibid.*), not every comment on reasonable doubt constitutes reversible error.

Here, we conclude that while it is always a risky proposition to expand on the reasonable doubt standard beyond the pattern jury instruction, the court's comments did not have the effect of lowering the prosecution's burden of proof. The court's points relating to the puzzle analogy can be summarized as follows: (1) at the end of the case, the jury will be asked to decide what happened (i.e., what picture the puzzle depicts); (2) one possibility is the jury could decide there are "so many pieces missing that you can't say what the picture is"—which would mean there is reasonable doubt; (3) another possibility is there is "only one piece missing but that piece was so large you couldn't tell what the picture was, that would be a reasonable doubt"; and (4) another possibility is the jury would have "an abiding conviction" the puzzle pieces depict a particular picture even if there are a few pieces missing. Frankly, we see nothing legally inaccurate in these concepts.[9] It is correct the evidence must leave the jury with an "abiding conviction" something is true in order for it to satisfy the reasonable doubt standard. (CALCRIM No. 220.) The absence of a single piece of evidence could give rise to

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9 Additionally, we note the court's informal comments came during voir dire, not the final jury instructions. "[E]rrors … occurring during jury voir dire, prior to the introduction of evidence or the giving of formal instructions, are far less likely to have prejudiced the defendant." (*People v. Medina* (1995) 11 Cal.4th 694, 745.)

Moreover, the court repeatedly instructed the jury with CALCRIM No. 220, which includes a clearly correct explanation of reasonable doubt.

reasonable doubt. And the evidence need not "eliminate all possible doubt" to satisfy the reasonable doubt standard. (*Ibid*.)

3. Defendant's Contrary Arguments Are Unpersuasive

Defendant cites several cases which do not alter our conclusion.

In *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*), the prosecutor used a PowerPoint presentation to describe the reasonable doubt standard:

> "The PowerPoint program begins with a blue screen. When the program is started, a slide show begins in which six different puzzle pieces of a picture come onto the screen sequentially. The picture is immediately and easily recognizable as the Statue of Liberty. The slide show finishes when the sixth puzzle piece is in place, leaving two rectangular pieces missing from the picture of the Statue of Liberty—one in the center of the image that includes a portion of the statue's face and one in the upper left-hand corner of the image." (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1264.)

> "The prosecutor went on to tell the jury that '[w]e know [what] this picture is beyond a reasonable doubt without looking at all the pieces of that picture. We know that that's a picture of the Statue of Liberty, we don't need all the pieces of the [*sic*] it. And ladies and gentlemen, if we fill in the other two pieces [at this point the prosecutor apparently clicks the computer mouse again, which triggers the program to add the upper left-hand rectangle that includes the image of the torch in the statue's right hand and the central rectangle that completes the entire image of the statue], we see that it is, in fact, the [S]tatue of [L]iberty. And I will tell you in this case, your standard is to judge this case beyond a reasonable doubt.' The prosecutor argued such standard was met by the evidence." (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1265.)

The Court of Appeal concluded the prosecutor's presentation "misrepresented the 'beyond a reasonable doubt' standard." (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1266.) The first issue identified by the Court of Appeal was how readily identifiable the image of the Statue of Liberty was. "The Statue of Liberty is almost immediately recognizable in the prosecution's PowerPoint presentation. Indeed, some jurors might guess the picture is of the Statue of Liberty when the first or second piece is displayed." (*Id.* at pp. 1266–1267.) Second, the Court of Appeal concluded the prosecutor's

argument that the image could be identified with only six of eight pieces improperly conveyed to the jury that reasonable doubt had a quantitative measure (i.e., 75 percent). (*Id.* at pp. 1267–1268.)

People v. Otero (2012) 210 Cal.App.4th 865 (*Otero*), also involved a prosecutor's PowerPoint presentation. A diagram in the presentation had the outlines of California and Nevada, with the words "No Reasonable Doubt" at the top. (*Id.* at p. 869.) "In southern Nevada was a dollar sign. 'Ocean' was printed to the left of California. 'San Diego' was printed inside California, but it was printed in the northern part of the state. Below 'San Diego' was a star and the word 'Sac.' Below that was 'San Francisco.' In Southern California was 'Los Angeles.' The following statement was at the bottom of the diagram: 'Even with incomplete and incorrect information, no reasonable doubt that this is California.' " (*Ibid*.)

The prosecutor argued to the jury:

> " 'I'm thinking of a state and it's shaped like this. And there's an ocean to the left of it, and I know that there's another state that abuts this state where there's gambling. Okay. And this state that I'm thinking about, right in the center of the state is a city called San Francisco, and in the southern portion of the state is a city called Los Angeles. And I think the capital is Sac-something. And up at the northern part of the state there's a city called San Diego. I'm just trying to figure out what state this might be.'
>
> " 'Is there any doubt in your mind, ladies and gentlemen, that that state is California? Okay. Yes, there's inaccurate information. I know San Diego is not at the northern part of California, and I know Los Angeles isn't at the southern. Okay. But my point to you in this—' " (*Otero*, *supra*, 210 Cal.App.4th at pp. 869–870).[10]

Otero held the prosecutor's presentation was misconduct. *Otero* focused on the first problem identified in *Katzenberger*—the recognizability of the image being used

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10 At that point, the court sustained an objection to the argument, and the prosecutor no longer referenced the diagram. (*Otero*, *supra*, 210 Cal.App.4th at p. 870.)

(i.e., the shape of California).[11] (*Otero, supra,* 210 Cal.App.4th at p. 872; see also *People v. Centeno* (2014) 60 Cal.4th 659, 668–669.)

The trial court's comments in this case avoided both problems identified in *Katzenberger* and *Otero*. First, the court here did not refer to a puzzle depicting a readily recognizable image. Instead, the court discussed whether the known puzzle pieces give rise to an abiding conviction the puzzle depicts *whatever* image is on the cover of the box. Second, the court avoided the quantitative measure problem by expressly contemplating even a *single* missing "puzzle piece" could be so important that it gives rise to reasonable doubt.[12]

In sum, while expounding on reasonable doubt can be problematic, here it did not run afoul of the two issues identified in cases like *Katzenberger* and *Otero*.[13] We find no prejudicial error.

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11 The *Otero* court also noted the diagram was "identifiable using but one of eight pieces of information supplied by the diagram." (*Otero, supra,* 210 Cal.App.4th at p. 873.)

12 Similarly, in *People v. Williams* (2017) 7 Cal.App.5th 644, the prosecutor used the analogy of a jigsaw puzzle of the Eiffel Tower. The prosecutor said, " 'You will see the Eiffel Tower even though some pieces might be missing just like from a jigsaw puzzle. You get past *two-thirds* of it. You say it is the Eiffel Tower. You know what it is.' " (*Id.* at p. 685, italics added.) Thus, as in *Katzenberger*, the comments in *Williams* involved a recognizable image and a quantitative measure of reasonable doubt.

13 Defendant also cites to *People v. Johnson* (2004) 115 Cal.App.4th 1169, *People v. Johnson* (2004) 119 Cal.App.4th 976, and *People v. Nguyen* (1995) 40 Cal.App.4th 28. In *People v. Johnson, supra*, 115 Cal.App.4th 1169, the court said, among other things, " 'We take vacations; we get on airplanes. We do all these things because we have a belief beyond a reasonable doubt that we will be here tomorrow or we will be here in June, in my case, to go to Hawaii on a vacation. But we wouldn't plan our live[]s ahead if we had a reasonable doubt that we would, in fact, be alive.' " (*People v. Johnson, supra,* 115 Cal.App.4th at p. 1171.) In a separate case with the same title, *People v. Johnson* (2004) 119 Cal.App.4th 976, the trial court related the reasonable doubt standard to everyday decisions like driving through a green light. (*People v. Johnson, supra,* 119 Cal.App.4th at pp. 985–986.) And in *People v. Nguyen* (1995) 40 Cal.App.4th 28, the reasonable doubt standard was related to changing lanes while driving or getting married. (*Nguyen, supra,* 40 Cal.App.4th at p. 36.)

These cases involve comments that are simply too different from the present case to be helpful.

IV. Defendant has Failed to Show Prejudice from the Admission of the Dower Interview Video

A. Background

After Jocelyn testified at trial, the prosecution requested to play video of the interview with Caroline Dower for the jury. Defense counsel objected on grounds the evidence was cumulative and lacked proper foundation. The court observed part of the interview may be cumulative while other parts may not be. The court also said a proper foundation would have to be presented before the video could be played.

After an off-the-record discussion in chambers, the court indicated defense counsel objected on hearsay grounds. Defense counsel had also objected to parts of the interview that referenced subjects excluded under in limine orders. The court contemplated reviewing the objections and redacting the interview where necessary.

After a hearing, the court found the prosecution had established sufficient foundation to show portions of the videoed Dower interview to the jury.

The court ordered portions of the interview referencing certain subjects be redacted, including but not limited to: (1) defendant's possession of pornography; (2) why Patricia attended church; (3) the fact her sisters missed their dad and did not know about the molestation; and (4) an incident of molestation Jocelyn did not testify to at trial. The redacted recording of the interview was played for the jury.

B. Analysis

Defendant contends the court erred in admitting the Dower interview.

1. Hearsay and the Prior Consistent Statement Exception

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).)

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." (Evid. Code, § 1236.)

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] … [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791.)

2. The Attorney General has Not Established Admissibility Under Evidence Code Section 791, Subdivision (b)

The Attorney General cites to Evidence Code section 791 but does not explain how its requirements were satisfied. The Attorney General does argue that Jocelyn had no motive to lie during the interview with Dower. That may be true, but it is not the issue under this statute. Instead, we look to the *alleged* motive for fabrication and must determine whether the prior consistent statement was given "before" that "motive is alleged to have arisen." (Evid. Code, § 791, subd. (b).) As the proponent of the evidence (i.e., the interview tape), it was the prosecutor's burden to establish that particular chronology. (See *People v. Coleman* (1969) 71 Cal.2d 1159, 1166, overruled on other grounds in *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 966, fn. 6.) Here, the defendant suggested Jocelyn lied to help Patricia get a divorce from defendant. Consequently, the prosecution needed to show the Dower interview took place *before* Jocelyn allegedly had reason to lie to help Patricia get a divorce. The record reveals no reason to believe the motive to lie for Patricia would have only arisen *after* Jocelyn's interview with Dower. Consequently, the prosecution did not meet its burden of establishing admissibility under this hearsay exception.

3. Any Error Was Harmless

However, we conclude any error was harmless.

When a defendant claims a prior inconsistent statement was improperly admitted, the question is whether it is "reasonably probable that admission of the … statement affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [citation].)" (*People v. Andrews* (1989) 49 Cal.3d 200, 211, fn. omitted.)

Defendant argues the admission of the Dower interview was prejudicial because the case turned largely on Jocelyn's credibility and the interview bolstered that credibility. However, the credibility impacts of the interview were a mixed bag. The tape did show Jocelyn had made allegations similar to her trial testimony back in 2013. However, the interview also showed even back in 2013—when the incidents were presumably fresher in her mind—Jocelyn repeatedly used tentative language like "probably" and "I don't remember."[14] Indeed, the Dower interview is a central piece of *defense counsel's* closing argument for this reason. Specifically, defense counsel argued:

> "And then if you look at the interview, the actual interview that you watched, I don't know about you, but I counted two no[e]s, ten I think so, 28 probably, 49 I don't knows when asked specific questions about that. Is she unreliable then or is she unreliable now? Either way she's unreliable and you can not [*sic*] convict a man on unreliable testimony. Again, she can't remember times, dates, even the season which these things had occurred. Clothing of defendant. Whether he had a penis out or was it something hard. I don't know. Her age. She says well, it started when I was 8, maybe 9, maybe 10. Maybe it first started when I was at the Kerman house and we were in my mom and dad's bedroom. But then she reverses herself and says well, I don't think it did happen in there. And then

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14 Moreover, while the absence of evidence that the Dower interview occurred before Jocelyn would have allegedly had motive to lie undermines the Attorney General's claim of admissibility under the prior consistent statement exception, that same absence undermines any prejudicial effect. The reason the prosecution would want to admit a prior consistent statement that occurred *before* a motive to lie arose, is to show that the purported motive to lie is *not* the explanation for the later statements. That is how prior consistent statements under Evidence Code section 791, subdivision (b) bolster credibility. Yet, that credibility-enhancing effect is not present here. Instead, the jury was simply presented with evidence that Jocelyn made similar allegations on two separate occasions, with the *same* alleged motive to lie on both occasions. Thus, the prior consistent statement does far less to mitigate the defendant's claim Jocelyn lied to help to mother than if the interview had occurred before Jocelyn would have had such a motive.

when asked specific questions well, it probably happened like this. I think it happened like that. She's not sure of whether it did or didn't happen."

For these reasons, we simply cannot say that the Dower interview strengthened Jocelyn's credibility so much as to have affected the verdict.

DISPOSITION

Defendant's sentence on count 5 is reduced to a term of 15 years to life. Defendant's sentence on count 6 is also reduced to a term of 15 years to life. The trial court is directed to have a new abstract of judgment prepared and transmitted to the appropriate parties and entities. In all other respects, the judgment is affirmed.

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HILL, P.J.

WE CONCUR:

_____
LEVY, J.

_____
PEÑA, J.